

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>PATRICIA M. RAY</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 247,267
<b>HCA WESLEY MEDICAL CENTER</b>	)	
Respondent	)	
AND	)	
	)	
<b>TRANSPORTATION INSURANCE</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed the August 11, 2000 Order entered by Administrative Law Judge Nelsonna Potts Barnes.

**APPEARANCES**

Charles W. Hess of Wichita, Kansas, appeared for claimant. P. Kelly Donley of Wichita, Kansas, appeared for respondent and its insurance carrier.

**RECORD**

The record consists of the administrative file compiled to date and the transcript from the August 10, 2000 penalties hearing held before Judge Barnes.

**ISSUES**

This is a claim for penalties due to respondent and its insurance carrier's failure to timely pay temporary total disability benefits for the week of March 27, 2000 through April 2, 2000. After conducting the August 10, 2000 penalties hearing, Judge Barnes assessed penalties against respondent and its insurance carrier in the sum of \$50 per week for the period from June 28, 2000, to August 10, 2000, for a total of \$350.

Claimant contends Judge Barnes erred. Claimant argues that respondent and its insurance carrier were 18.57 weeks late in paying the temporary total disability benefits in question and, therefore, the Judge erred by assessing penalties from only June 28, 2000, instead of from April 3, 2000, the date that the benefits became due. Therefore, claimant believes the Judge should have assessed penalties for 18.57 weeks at \$100 per week for a total of \$1,857 or, at a minimum, assessed penalties at \$50 per week for a total of \$928.50.

Conversely, respondent and its insurance carrier argue that they acted in good faith and, therefore, the Judge should not have awarded any penalties. In the alternative, they argue that \$350 is a reasonable sum for penalties if any should be due.

The only issues before the Appeals Board on this review are whether penalties should be assessed against respondent and its insurance carrier and, if so, how much.

#### **FINDINGS OF FACT**

After reviewing the record, the Appeals Board finds:

1. The facts are not in dispute. Pursuant to an agreed order, claimant was entitled to receive temporary total disability benefits in the sum of \$286.93 for the week of March 27, 2000, through April 2, 2000. But claimant did not receive that payment and on April 20, 2000, claimant's attorney mailed a Demand for Compensation to respondent's attorney. That document, which was filed with the Division of Workers Compensation on April 21, 2000, reads in part:

Pursuant to an Agreed Order dated September 17, 1999 attached hereto as Exhibit "A", and an Order issued by Administrative Law Judge Nelsonna Potts Barnes dated November 9, 1999 attached hereto as Exhibit "B", demand is hereby made, pursuant to K.S.A. 44-512a, for the following:

. . .

2. Payment of past due temporary total disability payment covering dates of March 27, 2000 to April 2, 2000.

The above-stated to be issued within twenty (20) days from receipt of this demand. If said demand is not satisfied, Claimant shall seek the appropriate statutory penalties and attorney fees.

2. On approximately June 8, 2000, respondent's attorney advised claimant's attorney that a check for the benefits in question had been issued and negotiated. On June 27, 2000, respondent's attorney mailed a copy of the negotiated check to claimant's attorney.

A photocopy of that check was introduced at the August 10, 2000 hearing. The check was made payable to claimant. The reverse side of the check is partially illegible but it is legible enough to determine that it was deposited with Intrust Bank on April 3, 2000 and further displays the following endorsement:

FOR DEPOSIT ONLY  
WESLEY MEDICAL CENTER

There is no question that claimant's signature does not appear on the check as an endorsement.

3. After receiving the photocopy of the negotiated check, claimant's attorney immediately contacted Intrust Bank who verified that the check had been deposited into one of respondent's accounts. On June 28, 2000, claimant's attorney wrote respondent's attorney and advised that respondent had negotiated and deposited claimant's check.

4. When the parties appeared at the August 10, 2000 penalties hearing, payment still had not been made but respondent's attorney advised the Judge that the check had been sent. At that hearing, respondent's attorney stated:

. . . I would -- I cannot provide you with a good explanation as to why from June 28 of 2000 it has taken this long to get this paid. I have been assured by my client that it has been overnighted directly to Mr. Hess's office.

In her brief to the Board, claimant represents that payment was received on August 10, 2000.

#### CONCLUSIONS OF LAW

1. The August 11, 2000 Order should be modified. The Board concludes that claimant is entitled to receive \$50 per week for 12.43 weeks for the period from April 3, 2000, through June 28, 2000, and \$100 per week for 6 weeks for the period from June 29, 2000, through August 9, 2000, for a total of \$1,221.50.

2. The Workers Compensation Act provides that a worker is entitled to receive a civil penalty when compensation is not paid when due. The worker must serve written demand upon the employer and its insurance carrier that specifically identifies the disability compensation or medical expense that is claimed to be unpaid. But the employer and its insurance carrier can avoid the civil penalty by paying the compensation within 20 days after receiving the written demand. The penalty statute provides, in part:

(a) In the event **any compensation**, including medical compensation, which has been **awarded** under the workers compensation act, **is not paid when due** to the person, firm or corporation entitled thereto, the **employee shall be entitled to a civil penalty**, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of **not more than \$100 per week for each week any disability compensation is past due and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill, if:** (1) Service of **written demand for payment**, setting forth with **particularity** the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; **and** (2) **payment** of such demand is thereafter **refused or is not made within 20 days from the date of service of such demand.**<sup>1</sup> (Emphasis added.)

3. Respondent and its insurance carrier do not dispute that claimant complied with the penalty statute. Instead, they argue that penalties should not be assessed because the delay in making payment was not the result of respondent's willful failure to abide by the agreed September 17, 1999 Order. Respondent and its insurance carrier state on pages 4 and 5 of their brief to the Board:

. . . Although respondent's counsel candidly acknowledged that temporary total disability benefits for the week of March 27, 2000 to April 2, 2000, was delayed in ultimately reaching claimant, the delay was not the result of respondent's willful failure to abide by the Agreed Order of September 17, 1999. Respondent [sic] did in fact issue a check for these benefits to claimant in a timely manner. However, through a good faith mistake, the funds did not reach claimant, and were instead diverted to another recipient.<sup>2</sup> However, as far as respondent knew, the check had been appropriately issued and received.

4. Time deadlines, some of which are very short, are critical under the Workers Compensation Act. For example, workers who fail to timely notify their employers of an accidental injury or who fail to make timely written claim for benefits are forever barred from receiving benefits for their work-related injuries.<sup>3</sup> In many instances, failing to make timely

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<sup>1</sup> K.S.A. 44-512a.

<sup>2</sup> That other recipient being the respondent.

<sup>3</sup> See K.S.A. 44-520 and K.S.A. 44-520a.

temporary total disability benefit payments to a disabled worker places that worker and her or his family in financial distress. Thus, employers and their insurance carriers should promptly investigate and respond to allegations that compensation has not been paid.

5. As indicated above, claimant served demand for payment upon respondent's attorney in April 2000. It then took respondent and its insurance carrier until June 27, 2000, to mail to claimant's attorney a copy of the negotiated check apparently without bothering to determine whether the check bore claimant's signature. Then, despite knowledge that respondent had deposited the check intended for claimant, respondent and its insurance carrier continued to delay making payment until August 10, 2000.

Under these facts, the Board finds and concludes that respondent and its insurance carrier should pay claimant penalties at \$50 per week for the period from April 3, 2000, through June 28, 2000, a period of 12.43 weeks, which equals \$621.50. Respondent and its insurance carrier may have initially held a good faith belief that they had paid claimant the benefits in question. But any investigation that they conducted fell far short as they failed both to inquire why the negotiated check bore Wesley Medical Center's endorsement rather than claimant's and to discover that the check was deposited by respondent. It appears that respondent and its insurance carrier merely sat back and waited for claimant's attorney to investigate the matter.

The Board finds and concludes that respondent and its insurance carrier should pay claimant penalties at \$100 per week from June 29, 2000, through August 9, 2000, a period of 6 weeks, which equals \$600. The Board assesses the maximum penalty for that period because respondent and its insurance carrier had knowledge commencing approximately June 29, 2000, at the latest, that respondent had negotiated the check rather than claimant. Nevertheless, respondent and its insurance carrier failed to make payment until over a month later.

Because it was egregious for respondent and its insurance carrier to fail to make payment for more than a month following the revelation that respondent had deposited claimant's check, the Board concludes that the maximum penalty should be levied from the approximate date of that revelation.

**WHEREFORE**, the Appeals Board modifies the August 11, 2000 Order entered by Judge Barnes and orders respondent and its insurance carrier to pay claimant penalties in the sum of \$1,221.50.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Charles W. Hess, Wichita, KS  
P. Kelly Donley, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director